

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. JONES

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STATE OF NEBRASKA, APPELLEE,  
V.  
THOMAS R. JONES, APPELLANT.

Filed June 12, 2012. No. A-11-852.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge.  
Affirmed.

Jason E. Troia, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN and SIEVERS, Judges, and CHEUVRONT, District Judge, Retired.

IRWIN, Judge.

I. INTRODUCTION

Thomas R. Jones appeals an order of the district court for Douglas County, Nebraska, sentencing him upon his no contest pleas to one count of second degree assault, one count of first degree assault, and one count of use of a weapon in the commission of a felony. On appeal, Jones asserts that the district court erred in sentencing him and that he received ineffective assistance of counsel. We find no merit to these assertions, and we affirm.

II. BACKGROUND

The events giving rise to this case occurred during the morning hours of April 3, 2010. According to the factual basis presented by the State and agreed to by Jones, on that date, two men were walking near 40th and Bedford Streets in Omaha, Nebraska, when a white sedan drove by with a black male driving. The two men did not recognize the driver and kept walking. A short while later, one of the two men looked back and observed that a black male had left the vehicle, was walking toward the two men, and had a gun raised and pointed at them. The two

men started to run and heard shots being fired; both were struck by gunfire, one in the neck and one in the foot. A surveillance video in the area captured images of the vehicle and a partial license plate number, which led law enforcement to a vehicle registered to Jones. Jones was later located driving the vehicle and was apprehended after a pursuit that included a traffic accident. During the pursuit, Jones was observed throwing the gun out of the vehicle's window. The two victims also identified Jones from a photographic lineup.

On July 26, 2011, Jones was charged by a second amended information with three offenses: second degree assault, first degree assault, and use of a weapon in the commission of a felony. Jones entered no contest pleas to all three charges. At the time of his pleas, the court advised Jones that the second degree assault charge carried a possible sentence of 1 to 20 years' imprisonment; that the first degree assault charge carried a possible sentence of 1 to 50 years' imprisonment; and that the use of a weapon charge carried a possible penalty of 5 to 50 years' imprisonment. The court also advised Jones that the sentence imposed for the use of a weapon charge was required to be imposed as a consecutive sentence to the sentence imposed for the underlying charge.

On September 23, 2011, Jones appeared for sentencing. At the sentencing hearing, Jones addressed the court and indicated that he felt the pleas he had entered had been "somewhat ill-advised," that he felt rushed to enter the pleas, and that he felt like he had been "somewhat ill-informed." He told the court that he was "not some menace to society" and requested the court consider "a suspended sentence" because he had a 10-month-old son whose life he had not yet been a part of and because he had an 11-year-old daughter whose mother was then incarcerated. Jones did not request to withdraw his plea.

The State argued for sentences of incarceration and noted that the only reason the injuries suffered by the victims were not more serious was because "it was a bad shot." The State noted that the shooting "was a brazen bold act on a Saturday morning in broad daylight, walking down the street, firing at people," and noted that Jones was at the time prohibited from owning or possessing a firearm.

The court orally imposed sentences on all three counts. On the second degree assault conviction, the court sentenced Jones to a term of 20 to 20 years' imprisonment and advised Jones that his "parole eligibility date . . . and [his] mandatory discharge date" would be "in 10 years." On the first degree assault conviction, the court sentenced Jones to a term of 20 to 20 years' imprisonment and advised Jones that his "parole eligibility date . . . and [his] mandatory discharge date" would be "in 10 years." On the use of a weapon conviction, the court sentenced Jones to a term of 10 to 10 years' imprisonment and advised Jones that the conviction carried a mandatory minimum sentence of 5 years and advised Jones that his "parole eligibility date . . . and [his] mandatory discharge date" would be "in 5 years."

After announcing the sentences imposed for each conviction, the court stated: "I'm going to run - I have to by law run those consecutive to one another." When the court asked if there was "[a]nything else," Jones' counsel indicated, "[n]o, Your Honor." The court indicated that the parties were excused, but counsel for the State asked: "Judge, are all three running consecutive, or just the first two?" The court replied: "All three are running consecutive." No objection or further inquiry was made by Jones or his counsel.

The court's written sentencing order imposed the sentences orally pronounced, as set forth above. The court also indicated in the written sentencing order that all three terms of incarceration were being imposed consecutively to each other. This appeal followed.

### III. ASSIGNMENTS OF ERROR

On appeal, Jones has assigned three errors. First, Jones asserts that the district court's oral pronouncement of sentences differed from the court's written pronouncement of sentences. Second, Jones asserts that the court's sentences are an abuse of discretion. Third, Jones asserts that he received ineffective assistance of counsel.

### IV. ANALYSIS

#### 1. ASSERTIONS CONCERNING SENTENCES IMPOSED

Jones' first two assignments of error concern assertions that the district court committed reversible error in imposing sentences upon Jones' pleas to the three charges. Jones asserts that the oral pronouncement of sentences differed from the written pronouncement of sentences and that the district court abused its discretion in imposing sentences. Both assertions of error are related to the court's imposition of consecutive sentences for all three counts. We find no merit to Jones' assertions.

##### (a) Discrepancy Between Oral and Written Pronouncements

Jones argues that the district court's oral pronouncement of sentence suggested only that the sentence imposed for the use of a weapon conviction was to be consecutive to the sentences imposed for the two assault convictions and that the court "changed" the sentence after excusing the parties at the sentencing hearing. Jones cites us to *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000), wherein the Nebraska Supreme Court held that if the sentence orally pronounced at sentencing differs from a later written sentence, the former prevails, and that the trial court cannot modify a valid sentence that has been put into execution.

Our review of the record reveals that the court did not impose different sentences during the oral pronouncement and in the written sentencing order. In both, the court imposed consecutive sentences on all three convictions. At the end of the sentencing hearing, the court indicated that the parties were "excused," and counsel for the State then asked the court if "all three [sentences were to be] consecutive." The court responded that "[a]ll three [were to be] consecutive." The record indicates that adjournment then occurred.

Our review of the record does not support Jones' suggestion that this "clarification" was somehow improper because the court had "excused" the parties and had not "call[ed] the parties back and reopen[ed] the sentencing hearing" or Jones' implicit assertion that he had left the courtroom and that the court addressed its "clarification" only "to the State's attorney." Brief for appellant at 8-9. Rather, our review of the record does not suggest that anyone had exited the courtroom or left the hearing when the court responded to the State's inquiry. The entire sentencing hearing lasted less than 15 minutes, and it appears that counsel for the State asked for the clarification immediately after the court uttered the words, "[y]ou're excused."

We also find no merit to Jones' assertion that the court's oral pronouncement somehow suggested that the sentences were not all consecutive because of the court's advisement concerning parole and mandatory discharge dates. Jones asserts that when the court indicated that the parole and mandatory discharge eligibility date for each of the assault convictions would be in "ten years," the court was suggesting that the sentences would be served concurrently. Brief for appellant at 9. Jones argues that the court's advisement concerning parole and mandatory discharge for the sentences imposed for the assault convictions suggested eligibility "ten years from then, not ten years from the end of the previous sentence." *Id.* We disagree.

The court's advisement concerning parole and mandatory discharge dates on each count--including the use of a weapon count that by law was required to be imposed consecutively--was simply an advisement of the number of years on that sentence that had to be served, not a suggestion of the number of years from the sentencing date that had to be served. The court advised Jones that the parole and mandatory discharge date for the sentence imposed on the use of a weapon conviction would be "in 5 years"--but Jones does not suggest that he somehow believed, because of that advisement, that the court meant 5 years "from the [sentencing hearing], not [5] years from the end of the previous sentence." See *id.*

There was no discrepancy between the oral pronouncement of sentences and the written sentencing order in this case. Both during the oral pronouncement of sentences and in the written sentencing order, the court ordered all three sentences to be served consecutively.

#### (b) Abuse of Discretion

Jones also asserts that the court abused its discretion in ordering consecutive sentences for the two assault convictions. Jones appears to argue that the court abused its discretion both by mistakenly believing the sentences had to be consecutive and by imposing excessive sentences. We find no merit to either assertion.

Jones argues that the court "abused its discretion by sentencing [Jones] with a mistaken belief that it had to run all of the sentences consecutive to one another." *Id.* at 11. We do not believe the record supports Jones' assertion.

Although it is accurate that after orally pronouncing the sentence on each of the counts, the court stated, "I'm going to run - I have to by law run those consecutive to one another," we do not read the court's statement as indicating a mistaken belief that it was required to make the two assault sentences consecutive. During the plea hearing, the court specifically advised Jones that any sentence imposed for the use of a weapon conviction would, by law, be required to be consecutive to "the underlying charge." The court's statement at sentencing may have been a less than artful choice of words, but we do not read the statement as indicating that the court somehow believed that it was required to impose consecutive sentences for the assault convictions; indeed, the court's advisement at the time of Jones' plea did not include any such suggestion. Rather, we conclude that the court elected to impose consecutive sentences as an exercise of its discretion.

When reviewing a sentence within statutory limits, an appellate court reviews for an abuse of discretion. *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012). A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012). A judicial abuse of

discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Parminter, supra*.

There is no assertion that the sentences imposed in this case were outside the statutory limits. Rather, Jones' assertions on appeal all concern the fact that the court imposed consecutive sentences on the two assault convictions. We do not find this to be an abuse of discretion. As noted above, we do not conclude that the record supports a finding that the court mistakenly believed it was required to impose consecutive sentences. In addition, although Jones accurately notes that a majority of his criminal record comprised misdemeanor or traffic offenses and did not include substantial prior convictions for crimes of violence, that observation does not tell the entire story.

The offenses for which Jones entered no contest pleas to charges of first degree assault, second degree assault, and use of a weapon in the commission of a felony involved him firing a handgun at two men in broad daylight. Additionally, although Jones' criminal history did not include a long history of violence, it does reflect a continual pattern of criminal behavior starting in 1993, when he was 12 years of age. Since then, he has had multiple drug-related offenses, repeated convictions for operating a motor vehicle without a license or during suspension, obstruction of the administration of law, and other traffic-related offenses. In addition, although Jones' brief makes no mention of it, he was convicted in 2006 of being a felon in possession of a firearm and was on supervised release from federal incarceration at the time he again illegally possessed and used a firearm to shoot the two victims in the present case.

In light of the nature of the offenses in this case, as well as Jones' consistent history of disregard for the law, the sentences imposed in this case were not an abuse of discretion. We find Jones' arguments to the contrary to be without merit.

## 2. INEFFECTIVE ASSISTANCE OF COUNSEL

Jones also asserts that his trial counsel was ineffective. Jones' assertions related to the effectiveness of his counsel concern his counsel's advice that Jones enter into a plea agreement in this case. We find the record insufficient for review of this assignment of error.

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). In most instances, it cannot, because the trial record reviewed is devoted to issues of guilt or innocence and will not disclose the facts necessary to decide either prong of the ineffective assistance of counsel analysis. *Id.* We conclude that such is true in this case.

In his brief on appeal, Jones devotes one page to arguing that his trial counsel was ineffective when counsel "pressured him to enter into the plea agreement." Brief for appellant at 12. Jones makes numerous assertions concerning what counsel indicated to him about how his sentences might be impacted if he chose to proceed to trial, about what his sentences might have been if he proceeded to trial, and about how counsel urged him to enter into a plea on the eve of his trial. Jones does not--and could not--cite this court to anything in the record supporting his assertions about what counsel may have said or advised him; such is not in the record presented on appeal. Although Jones did address the court at sentencing and indicated that he had felt his plea was ill-advised, we conclude that the record is insufficient for us to meaningfully assess

what advice Jones received and whether such advice was proper or ineffective. As such, we decline to address this assignment of error.

#### V. CONCLUSION

We find no merit to Jones' assertions concerning the sentences imposed upon his no contest pleas. We find the record insufficient to address Jones' ineffective assistance of counsel claim. We affirm.

AFFIRMED.